

SILVERMAN, Circuit Judge, dissenting:

Federal sentencing law was in chaos at the time the district court imposed sentence in this case. No one knew how the situation would resolve, and the district court gamely tried to anticipate the possible outcomes. However, the district court did not divine exactly what occurred. It did not foresee that the Guidelines would turn out to be advisory. The contingencies necessary to invoke the 51-month sentence did not include that essential ingredient. Therefore, the 51-month sentence never came into effect. The 18-month sentence is the one that counts.

Imposed a month after *Blakely* but six months before *Booker*, the sentence of 18 months was premised on an entirely reasonable but ultimately incorrect understanding – namely, that the Guidelines were mandatory, and that in applying them, the court was limited to the facts admitted by the defendant at the change of plea. See *Blakely v. Washington*, 124 S.Ct. 2531, 2537 (2004). We now know that the Guidelines are only advisory, and because of that, a sentencing court is *not* limited to the facts admitted by the defendant or found by a jury. *United States v. Booker*, 125 S.Ct. 738, 764 (2005).

That's too bad for the defendant, but the fact remains that the district court applied the law incorrectly. The government was within its rights to appeal. The defendant is not entitled to keep an unjustified sentencing windfall resulting from a judicial error of law. *See Jones v. Thomas*, 491 U.S. 376, 387 (1989).

I would reverse the district court's sentence(s) and remand for a full de novo re-sentencing premised on the understanding that the Guidelines are not mandatory.